IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 69-4

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE*

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Amicus Curiae,
State House Annex,
Trenton, New Jersey 08625

Counsel and on the Brief.

TABLE OF CONTENTS

Cases Cited

United States Constitution Cited

Statutes Cited

Other Authorities Cited

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Statement of Interest of the *Amicus Curiae*

The State of New Jersey, *amicus curiae*, by its Attorney General, respectfully submits this brief in the above-captioned appeal in support of the position advanced by the appellee, State Commission of Investigation.

One of the principal purposes of the *amicus curiae* in participating in this case is to demonstrate to this Court that the interests of the administration of criminal justice are enhanced by the ability to employ "use plus fruits" immunity, as embodied in N.J.S.A. 52:9M-17.

It is the view of the *amicus curiae* that such an immunity formula, by its own terms, offers the same protection as is afforded by the Fifth Amendment privilege against self-incrimination. The reality of this protection can be reliably guaranteed by the exclusionary rules of evidence developed by this Court in the last fifty years. In light of this, it would be illogical as well as socially undesirable to require that one compelled to testify receive immunity from prosecution for violations arising out of the transactions about which he is compelled to testify.

In no other context has it been suggested that the Fifth Amendment's protection extends this far. There being no conceptual or practical reason why such protection is necessary to insure the witness that his compelled testimony, or evidence derived therefrom, will not be used against him, it is plain that such an immunity is wastefully broader than the privilege it seeks to supplant.

The foregoing conclusion is well illustrated by the present case. Appellant has stipulated to his notoriety in the area of organized crime. (App's Br. pp. 6, 40). He is presently the subject of six separate pending indictments in New Jersey and was recently convicted upon an indictment charging him with conspiracy to operate an illegal gambling organization and bribery of a public official.

It is clear from the very fact that appellant has hitherto refused to testify before the State Commission of Investigation that in procuring the foregoing indictments and in obtaining appellant's conviction on the first of those

indictments to be tried, the State has not required the use of appellant's compelled testimony in order to prosecute him.

Moreover, New Jersey, at the present time, is confident that it will be able to secure convictions against appellant on all of the presently pending indictments on the basis of evidence it now possesses. It is the State's belief, based upon extensive surveillance and confidential investigation that appellant is, or recently has been, a central force in organized crime in the State. By virtue of his position, appellant may be reasonably supposed to possess a great knowledge of the activities of organized crime in New Jersey.

As appellant indicates, the State freely acknowledges that Zicarelli is now and has been for some time a main or prime target for its investigation. If, however, the State and its investigatory agencies were to be bound to the so-called transactional immunity formula, the prosecution and society generally would be placed on the horns of a dilemma. If the State, through the appellee or a grand jury, sought to compel Zicarelli to testify pursuant to a transactional immunity standard, it presumably would be forced to abandon further efforts to prosecute him even though the evidence necessary to prosecute and convict him may have been independently obtained. While such compulsion of appellant's testimony might allow the State to gather sufficient evidence to prosecute various of Zicarelli's associates successfully, Zicarelli himself would likely emerge unscathed.

That the State in the present case would face a Hobson's Choice under a transactional standard is made clear by the equally distasteful alternative that would remain if it declined to immunize Zicarelli from prosecution. If appellant were allowed to remain silent, the State be-

lieves that he could be convicted under the indictments now pending. However, from the knowledge of the history of organized crime it is feared that the organization itself would remain to some extent untouched.

The State regards both of the aforementioned alternatives available in this case under a transactional standard as unsatisfactory. Either result is at odds with traditional notions of the proper administration of justice, of fundamental fairness and of equal protection of the law.

If the State refused to allow appellant to escape prosecution and conviction, it would be relegated to attacking the hierarchy of organized crime on a "one-at-a-time" basis, thereby permitting a continual retrenchment in the ranks even as leading figures were brought to justice. At this juncture in history, the *amicus curiae* respectfully submits that law enforcement must be able to marshal more than the principle of deterrence to deal on even terms with the forces of organized crime. Law enforcement agencies must be able to wage their assault on all fronts and must be able to attack criminal organizations at all levels.

For this reason, the interest of society requires the ability to employ an immunity formula which, though it reliably assures one compelled to testify that he receives all of the protection he is entitled to under the Fifth Amendment, may likewise vindicate society's right to punish him for all crimes that can be proven without benefit of his own disclosures. *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) and *Gardner* v. *Broderick*, 392 U.S. 273 (1968), offer cogent support for the belief, as developed in this brief, that an immunity formula which absolutely proscribes the use of compelled testimony or evidence derived therefrom is coextensive with the privilege against self-incrimination.

The interest of the *amicus curiae* and the other states that join in this brief in the present case is founded on that belief.

Summary of Argument

It is the position of the State of New Jersey, *amicus curiae*, that N.J.S.A. 52:9M-17(b), which immunizes a witness from having his compelled testimony or the fruits therefrom used to expose him to criminal prosecution or penalty, provides a protection coextensive with that furnished by the Fifth Amendment privilege against self-incrimination.

The sufficiency of such an immunity formula has never before been placed in focus by cases heretofore decided on the merits by this Court. Previous cases have determined on the one hand that immunity formulas which only immunize the witness from the subsequent use of his compelled testimony, but fail to proscribe the use of such testimony to obtain investigatory leads or other sources of incriminating evidence, are constitutionally defective, *e.g.*, *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965).

On the other hand, this Court has repeatedly held that grants of immunity which provide for an absolute bar against the prosecution of a witness for any act arising out of a transaction about which he is compelled to testify do furnish at least as much protection as is afforded by the Fifth Amendment privilege. *Brown* v. *Walker*, 161 U.S. 591 (1896); *Ullmann* v. *United States*, 350 U.S. 422 (1956). However, such transactional immunity formulas have been rightfully criticized for affording the witness a protection which is "wastefully broader" then that granted by the privilege. *Murphy* v. *Waterfront Com-*

mission, 378 U.S. 52, 107 (1964) (Mr. Justice White concurring).

The formula embodied in N.J.S.A. 52:9M-17(b) differs from either of the approaches yet considered by this Court in that its contours are ineluctably determined by the parameters of the privilege.

Contrary to the appellant's further contention, the employment of the word "responsive" to characterize the type of answers sought and immunized against any direct or indirect use against the witness actually serves to eliminate ambiguity and vagueness from the statute. Indeed the use of the "responsiveness" criterion in conjunction with the word "answer" was inspired by this Court's opinion in *Hoffman* v. *United States,* 341 U.S. 479 (1951), which employed a similar concatenation.

Appellant raises a further point with regard to the applicability of the privilege against self-incrimination to the threat of foreign prosecution. The only authority on this question rejects the notion that the privilege furnishes protection against the use of compelled disclosure in foreign prosecution of the witness. Canada is the only foreign nation cited to which appellant might be extradicted. Moreover it is the only country in which the fear of prosecution is not plainly fanciful. However, it is well established under both Canadian case law and Canadian federal statutes that the use of such compelled testimony would be barred in a subsequent Canadian prosecution.

From a practical standpoint the advantages to law enforcement of being able to employ an immunity formula of the type embodied in N.J.S.A. 52:9M-17 are manifold. The problem of guaranteeing that the immunity promised the witness by the statute is insured in fact may be adequately dealt under the exclusionary rules developed by

this Court. It has been recognized that such an approach is able to furnish one compelled to offer evidence or testimony the same protection he would have received had he been allowed to remain silent, while society's interest in "having the guilty brought to book" is also served. *United States* v. *Blue*, 384 U.S. 251 (1966).

ARGUMENT

POINT I

The testimonial immunity grant contained in N.J.S.A. 52:9M-17 is coextensive with the scope of the Fifth Amendment privilege against self-incrimination.

N.J.S.A. 52:9M-17(b) provides that a person complying with an order to answer a question posed by the State Commission of Investigation "shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." It is the position of the State of New Jersey, *amicus curiae*, that the protection afforded by this statute is equivalent to that offered by the Fifth Amendment privilege against self-incrimination.

Appellant takes the position that he is constitutionally entitled to "transactional" immunity, *i.e.*, complete protection against prosecution for the offense to which the compelled testimony relates. He further contends that the New Jersey statute violates the Fifth Amendment because it grants only a "testimonial" immunity, *i.e.*, protection against the use of the compelled testimony and the fruits thereof. For this proposition, principal reli-

ance is placed upon the decision of this Court in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). In response to that contention, the State respectfully urges that *Counselman* should not be read to require transactional immunity as a minimal constitutional standard and that to the extent it may require such standard, it should no longer be followed by this Court.

At issue in *Counselman* was a statute enacted by Congress in 1868 which provided as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party of a witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . ." 15 Stat. 37 (1868)

Upon consideration of the statute, this Court held that while the witness was protected thereunder from the use of the evidence obtained against him, he potentially was exposed on the basis of other evidence to which his testimony might lead. It was clear to the Court that the Fifth Amendment would not be satisfied unless the witness were also shielded against the latter possibility:

> "It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his

> property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." *Id.* 142 U. S. at 564.

After an extended review of a number of state and federal decisions and statutes, Mr. Justice Blatchford wrote what has become the principal ammunition of those who contend that *Counselman* requires transactional immunity:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provisions, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* 142 U.S. at 585-86.

It is noteworthy, however, that immediately following the last-quoted language, the opinion states:

> "Section 860, moreover, affords no protection against that *use* of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information that may supply other means of convicting the witness or party." *Id.* 142 U.S. at 586 (Emphasis supplied)

Congress was confronted with contradictory language in *Counselman* and reacted by passing a new statute which was designed to meet the broadest requirement discernible from that opinion. The statute provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter or thing" concerning which he may give or produce such evidence. 27 Stat. 443 (1893).

The constitutionality of this act was sustained in *Brown* v. *Walker,* 161 U.S. 591 (1896). The 1893 Act became a model for many "transactional immunity" statutes enacted by the federal government and the states.

If the *Counselman* case, *supra,* gave rise to intellectual uncertainty, the *Brown* case did not remove that uncertainty. *Brown* observes that the Fifth Amendment is susceptible of two interpretations. The first is a literal one and would bar the application of compulsion to force testimony from a witness. The second interpretation, and the one accepted by the Court, presupposes that the object of the Fifth Amendment is to secure a witness against a criminal prosecution which might be aided "directly or indirectly by his disclosure. . . ." Id. 161 U.S. at 595. The opinion pointed out that if no such prosecution were possible (in other words if the testimony operated as a complete pardon for the offense to which it related), then a statute absolutely securing such immunity to a witness would satisfy the demands of the Fifth

Amendment. That reasoning is relied upon by appellant in the present case and by some courts and legal commentators as supportive of the concept that the Constitution requires transactional immunity. See *e.g.*, the opinion of Judge Motley in *In re* (*Joanne*) *Kinoy*, —— F. Supp. —— (S.D.N.Y. 1971). Judge Motley further relies upon the subsequent decision of this Court in *Ullmann* v. *United States*, 350 U.S. 422 (1956), as providing reaffirmation of the concept. It should be pointed out, however that *Ullmann* did not consider whether a testimonial statute of the type presented by this case satisfies the Fifth Amendment privilege.

The dissent in *Brown* took the position that the absolute right to remain silent created by the Fifth Amendment was beyond the reach of Congress. The theory of the minority in *Brown* was that no immunity statute could supplant the right of an individual to be free from having to disclose facts involving disgrace or self-infamy. Such a concept appears to be unsupported by history. Dean Wigmore states the following with respect to the dissent in *Brown*:

> ". . . [This] misconception employs the argument that a statutory immunity for a crime cannot annul the privilege against self-crimination because the disgrace at least remains. It thus rests upon the assumption that the present constitutional privilege has the function of protecting against the disclosure not only of criminality but also of disgrace. The notion exhibited in these passages ignores the independence in principle, in details and in history of the two privileges." 8 WIGMORE, EVIDENCE §2255 (McNaughton rev. 1961).

It is not unreasonable to conclude that the main thrust of the majority opinion in *Brown* was to demonstrate

that the dissent was wrong in its concept of the scope of the Fifth Amendment. In rejecting the minority view, the majority may have inadvertently broadened the definition of constitutionally required immunity.

The question of "use" versus "transactional" immunity was never really in focus in *Brown*. The main issue there was whether any immunity statute could replace the privilege. In essence, the Court struck a bargain, amnesty for assistance. Nothing in that case and indeed nothing in the *Counselman* case, *supra*, holds that anything less than complete transactional immunity cannot match the contours of the privilege against self-incrimination. Indeed, in *Brown* there is language that may actually point to the opposite conclusion, *to wit*:

> "Stringent as a general rule [against self-incrimination] is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and therefore constituted apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of a criminal prosecution against a witness the rule ceases to apply . . ." *Id.* 161 U.S. at 597.

Further on in the majority opinion in *Brown*, the Court makes reference to another formula, different from that relied upon in upholding the statute, under which the compulsion of testimony might avoid self-incrimination:

> ". . . we think that the witness cannot properly be said to give such evidence against himself unless evidence may in some proceeding be *used* against him, or, unless he may be subjected to a prosecution for the transaction concerning which he testifies." *Id.* 161 U.S. at 604. (Emphasis supplied).

The last-quoted language described two different situations, the first of which would obtain a grant of immunity of the type embodied in N.J.S.A. 52:9M-17 and the second of which is the type that obtains under a statute of a general character considered in *Brown*. Perhaps that portion of the *Brown* opinion foreshadowed the emergence of a new genre of immunity statute of which N.J.S.A. 52:9M-17 is representative. To the extent that *Brown* was a reaffirmation of the "absolute immunity" concept projected in *Counselman* it is urged that *Brown* too should no longer be followed since it appears to exact too heavy a price from society.

In the opinion of the Supreme Court of New Jersey affirming the constitutionality of the statute here under consideration, *In re Zicarelli*, 55 N.J. 249 (1970), it was pointed out that at the time *Counselman* was decided, the immunity question concerned only a federal statute and the restraint the Fifth Amendment imposed upon the federal government. In the words of Chief Justice Weintraub:

> "Since then the Fifth Amendment has been found to apply to the States as well, and in addition the view has taken hold that evidence the federal government or a State obtains by forbidding compulsion may not be used by either jurisdiction. In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the States would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution. And although the Congress can, in furtherance of federal investigations, bar state

> prosecutions, still, the State's responsibility and interest in criminal matters being usually more pervasive and demanding that might be too high a price to pay. See *Knapp* v. *Schweitzer*, 357 U.S. 371, 378-379, 78 S.Ct. 1302, 2 L.Ed. 2d 1393, 1409 (1958). In this new setting the more acceptable solvent is to protect the witness against the use of his compelled testimony by both jurisdictions but with each remaining free to prosecute on the basis of evidence independently obtained. *Id.* 55 N.J. at 267.

The New Jersey Supreme Court indicated that the problem was resolved in favor of permitting testimony to be compelled by both jurisdictions in the case of *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). In that case, several persons had been held in contempt for refusing to answer questions posed as a result of an immunity grant under a New Jersey statute. The statute protected them from prosecution in New Jersey or New York but was silent with respect to any federal offenses. The individuals involved refused to answer on the ground that they might incriminate themselves under federal law. This Court held that the statute should be affirmed, but on the ground that the witness would indeed be protected in a federal prosecution by virtue of the Fifth Amendment.

After citing *Counselman* and quoting only those passages that criticized a prior federal statute for failing to protect against use of the fruits of testimony, this Court in *Murphy* held:

> ". . . the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits

> cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the State to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Id.* 378 U.S. at 79.

The concurring opinion of Mr. Justice White in *Murphy* lends credence to the view that this Court rejected the contention that the Fifth Amendment requires a grant of immunity from prosecution. Particular reference is directed to the following language:

> "In reaching its result the Court does not accept the far-reaching and in my view wholly unnecessary constitutional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions but also absolute immunity in these jurisdictions from any prosecution pertaining to any of the testimony given. The rule which the Court does not adopt finds only illusory support in a dictum of this Court and, and I shall show, affords no more protection against compelled incrimination than does the rule forbidding federal officials access to statements made in exchange for a grant of state immunity. But such a rule would invalidate the

immunity statutes of the 50 States since the States are without authority to confer immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. It would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violate state criminal laws, regardless of the wishes or needs of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation." *Id.* 378 U.S. 92-93.

While *Murphy* dealt with an inter-jurisdictional situation and did not on its face purport to affect whatever force *Counselman* continued to have in the intra-jurisdictional situation, the likelihood is that *Murphy* articulated a single standard equally applicable to either situation. If this were not true, then *Murphy* would have the result of establishing two co-existing standards: absolute immunity from prosecution in the context of a single jurisdictional situation and "use plus fruits immunity" as between two jurisdictions.

That result would be particularly anomalous in view of this Court's holding on the same day as *Murphy* (in the companion case of *Malloy* v. *Hogan,* 378 U.S. 1 (1964)) that the federal and state standards applicable to the Fifth Amendment's self-incrimination clause were the same.

The effect of *Murphy* is to reduce and virtually remove the force of the *Counselman* dictum with respect to absolute immunity and to offer compelling support for the

proposition that "use plus fruits immunity" is constitutionally adequate. See Duncan, *Federalism and the Fifth; Configuration of Grants of Immunity,* 12 U.C.L.A. L. Rev. 561 (1965).

In the case of *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70 (1965), this Court found that the statute in question suffered from an infirmity more fundamental then that which infected the statute considered in *Counselman, supra.* The statute in *Albertson* met neither the "absolute immunity" test nor the "use plus fruits" standard.

The question of whether an immunity against compelled testimony and its fruits was sufficient was left unanswered in *Stevens* v. *Marks,* 383 U.S. 234 (1966). However, in *Gardner* v. *Broderick,* 392 U.S. 273 (1968), it was stated that "answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruit in connection with a criminal prosecution against the person testifying," citing both *Counselman* and *Murphy.*

In urging before this Court that the "use plus fruits" immunity concept contained in N.J.S.A. 52:9M-17 is coextensive with the scope of the Fifth Amendment privilege, the State of New Jersey, *amicus curiae,* is fully aware of the many statements that have been made by this Court respecting the importance of that privilege. Justice Frankfurter, *e.g.,* in *Watts* v. *Indiana,* 338 U.S. 49 (1949) stated:

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . under our system society carries the burden of proving its charges against the

accused not out of his own mouth." *Id.* 338 U.S. at 54.

Mr. Justice Brennan, in *Malloy* v. *Hogan, supra,* 378 U.S. at 7, stated ". . . the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay."

The validity of the observations in the above statements is beyond question. Appellee, joined by the State of New Jersey, urges, however, that the statute here involved is consistent with that amendment. As Mr. Justice Brennan points out in his dissent in *Piccirillo* v. *New York,* 400 U.S. 548 (1971):

> "The words of the Fifth Amendment do not, in terms, suggest that government may compel men to incriminate themselves provided it promises that it will not prosecute them for the crimes revealed. The clause does not prohibit a prosecution or conviction; it prohibits the application *vel non* of compulsion to an individual to force testimony which incriminates him, regardless of whether he is actually prosecuted. Historically, one of the major evils sought to be allayed by the development of the privilege was the use of torture to extract a confession not the subsequent use of the confession in a criminal trial." *Id.* 400 U.S. at 564 (dissenting opinion)

It is thus seen that prosecution is not barred by the Fifth Amendment. It is the aspect of compulsion or torture that lies at the heart of this clause. *Ibid.* In modern cases this has come to mean simply that a witness cannot be convicted out of his own mouth. At the time of *Counselman,* the concept of the "fruit of the poisonous tree" doctrine had not been developed. However, when this

Court decided *Murphy* v. *Waterfront Commission, supra,* the doctrine was in full force and provided a viable mechanism for policing the operation of immunity statutes and obviated the necessity for absolute immunity.

In his concurring opinion in *Murphy,* Mr. Justice White fully discusses this subject and points out that the privilege against self-incrimination protects against real dangers and not remote or speculative ones. Rejecting the argument that a defendant may not be able to establish that the evidence against him was based on his own testimony, Mr. Justice White states:

> ". . . one might just as well argue that the Constitution requires absolute immunity from prosecution wherever the Government has obtained an inadmissible confession or other evidence through an illegal search and seizure, an illegal wiretap, illegal detention, and coercion. A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. *Malloy* v. *Hogan,* 378 U.S., at 78, 84 S. Ct. at 1493-1494; *Spano* v. *New York,* 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d. 1265; *Bram* v. *United States,* 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568. In all these situations a defendant must establish that testimony or other evidence is a fruit of the unlawfully obtained evidence. *Nardone* v. *United States,* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307; *Wilson* v. *United States,* 218 F. 2d 754 (C.A. 10th Cir.); *Lotto* v. *United States,* 157 F. 2d 623 (C.A. 8th Cir.), which proposition would seem *a fortiori* true where the Government has not engaged in illegal or unconstitutional conduct and where the inadmissible testimony is obtained by a government

other than the one bringing the prosecution and for a purpose unrelated to the prosecution." *Id.* 378 U.S. at 102-103 (concurring opinion).

The remedy for one who is able to show that he has testified in exchange for immunity is to compel the prosecution to demonstrate that its evidence is not tainted and that it derives from a wholly independent and proper source. *Id.* 378 U.S. at 79, fn. 18. But to bar any prosecution whatsoever would seem to extend a premium to the criminal that the framers of the Constitution never envisioned. It is urged that this Court affirm the constitutionality of N.J.S.A. 52:9M-17 and hold that testimony of a witness may be compelled so long as that witness is immunized from the use of that compelled testimony or anything derived therefrom.

POINT II

The requirement that an answer be "responsive" to the question in order to obtain immunity under N.J.S.A. 52:9M-17 neither renders the statute unconstitutionally vague nor conditions the grant of immunity.

It is appellant's further contention that N.J.S.A. 52:9M-17 is rendered unconstitutionally vague by its employment of the adjective "responsive" in conjunction with the word "answer". Appellant reasons that in being compelled to offer an answer to a question posed by the Commission he is, in the first instance, left completely at the mercy of the questioning body as to whether his answer will be accepted as "responsive" and therefore immunized from later use. Further, appellant perceives as inhering in the scheme of the statute, the possibility that his answer may in the future be deemed "unresponsive" by a court ignor-

ant of the nature and intent of the Commission's inquiry and thus be admitted in evidence against him at such later time.

It is abundantly clear that the application of N.J.S.A. 52:9M-17 to appellant poses neither of these threats. In *In re Joanne Kinoy, supra,* the witness raised nearly identical objections to testifying on the basis of the due process guarantee. The witness's argument there was bottomed on the notion that the immunization of her testimony could only run to answers to questions deemed related to the subject matter of the order to testify. Thus, the witness argued that the proposed order placed her "in an untenable position of having to guess whether or not the question is related to the subject matter of the order." (Slip opinion, p. 4). The witness's purported dilemma there was expressed in virtually the same terms employed by the appellant here:

> "If she thinks it is not related and refuses to answer, she may be held in contempt, if a court later determines it is related. If she thinks it is related to the subject matter of the order and answers the question she may have incriminated herself without the protection of immunity if a court later determines it is unrelated." *Ibid.*

Judge Motley, in remarks equally pertinent to the present case, illuminated the infirmity of the witness's argument:

> "The court agrees that the order would be violative of due process if the above described consequences flowed directly from it. But the proposed order does not subject the witness to such perils. If the witness is not sure whether or not a question is related

to the subject matter of the order, he is entitled to a ruling from a court. Only after such a ruling and the witness's continued refusal to answer would the witness be subject for contempt. This procedure ensures the witness that he will know in advance the conduct that is proscribed and guarantees that he will not inadvertently waive his privilege." (Slip opinion at pp. 4-5).

A similar procedure is available to appellant. The Commission is unable unilaterly to compel appellant's testimony upon pain of contempt or to refuse to immunize compelled testimony. At the point of his refusal to testify, the Commission must pursue a contempt citation against the witness in order to compell his testimony. At this juncture, the witness can obtain from the court a delineation of what will constitute a "responsive answer" to the question.

Where a witness's answer has been accepted by the Commission as responsive, without objection, or is offered after guidance has been received from a court, the State is foreclosed from collaterally attacking the "responsiveness" of this answer in a later prosecution. Moreover, appellant misconceives the possible sanction where, upon answering immediately, his answer is deemed to have been "unresponsive". The sanction imposed in this case would be the same sanction imposed in the event the witness refused to answer the question.

Both of these conclusions are clear from current practice and the design of the statute. In the contemplation of a provision which seeks to uncover truth, an unresponsive answer is tantamount to a *pro tanto* refusal to produce relevant evidence. Cf. *Glickstein* v. *United States*, 222 U.S. 139 (1911); *United States* v. *Shotwell Mftrg. Co.*, 355 U.S.

33 (1957); *Travellers Fire Insurance Co.* v. *Wright,* 322 P. 2d. 417, 423 (Okla. Sup. Ct. 1958); *Annot. Incriminatory Disclosures—Immunity,* 53 A.L.R. 2d 51 (1956); *Ferrantello* v. *State,* 158 Tex. Crim. 471, 256 S.W. 2d 587 (Tex. Ct. Crim. App. 1952).

It is well established that immunity legislation requires the sanction of contempt process to force all relevant evidence out of unwilling witnesses. *United States* v. *Bryan,* 339 U.S. 323, 353 *et seq., rehearing denied,* 339 U.S. 991 (1950). N.J.S.A. 52:9M-17 fulfills this requirement by employing the contempt power both in the situation where the failure of the witness to comply with the order to answer takes the form of a refusal to answer (the instant case), and the situation where the lack of compliance results from the answer's "unresponsiveness". The only sanction available under the statute to deal with such unresponsiveness is prosecution of the witness for contempt. The witness may be held in contempt for failure to give "an answer . . . in accordance with the order of the commission"; however, "such answer" is not to be used:

> ". . . to expose him to criminal prosecution . . . . [but] any *such answer given or evidence produced* shall be admissible against him . . . upon any investigation, proceeding or trial against him for such contempt." N.J.S.A. 52:9M-17 (b). (Emphasis supplied).

Where a witness refuses to testify there can be no "such answer given or evidence produced" to be admitted as evidence in a contempt proceeding. See *United States* v. *Bryan, supra* at 339-340. Clearly, the provision for introduction of "such answers" in a contempt proceeding refers to "unresponsive answers" and therefore provides that "such answers" may only be admitted in evidence against

the defendant in such a contempt proceeding. Hence, there is no threat under N.J.S.A. 52:9M-17 that appellant's testimony could later be used against him upon a finding by a court at that time that such testimony was not "responsive". Unless the Commission objects to an answer on the grounds that it is not "responsive", which objection may go either to its incompleteness or its gratuitous and irrelevant character, requiring the answer be stricken, and seeks to compel a "responsive answer" through a contempt order, use of such answer is absolutely barred.

However, it is the contention of the *amicus curiae* that these questions are largely academic. The concept of "responsiveness" as applied to the witness's obligation to testify is in no way elusive. The appellant's claim that the employment of the word "responsive" fatally obfuscates the requirement to answer imposed by the statute is belied by the long history of the use of this term by both courts and legal scholars in discussing the law of evidence.

The employment of the word "responsive" in conjunction with the obligation of a witness in giving answers extends at least to the time of Jeremy Bentham. Bentham characterized "responsive" testimony as the first of the principal means of producing "accuracy and completeness" in the answers of a witness. BENTHAM, JUDICIAL EVIDENCE, 52-54 (London, 1825).

The meaning of the word "responsive" in association with the word "answer" has remained unchanged to this day as the indicator of an answer's accuracy and completeness. *Henderson* v. *State*, 208 Ga. 73, 75, 65 S.E. 2d 175, 177 (Sup. Ct. Ga. 1951); SUTHERLAND, STATUTORY CONSTRUCTION, §5303 at 9 (1943).

Indeed, the inclusion of the word "responsive" in this particular statute appears to have been inspired by this

Court's employment of the term to qualify the word "answer" in the context of an immunity statute. In determining at what point a witness must be afforded immunity to compel his testimony after an invocation of the privilege against self-incrimination, this Court has held that immunity must be granted where it appears ". . . that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result." *Hoffman* v. *United States*, 341 U.S. 479, 487 (1950).

In thus stating the rule, the Court employed terminology favored by Dean Wigmore who states, "where the question is in the tenor not improper, but is answered with inadmissible matter not responsive to the question, objection made upon the answer is reasonable; its form here is a motion to strike out the answer." 1 WIGMORE, EVIDENCE § 18 at 324 (3rd ed. 1940). See also 3 WIGMORE *op. cit. supra* § 785; 5 WIGMORE, *supra* § 1392.

The New Jersey Legislature, in drafting N.J.S.A. 52:9M-17, was not alone in concluding the term was not too abstruse for inclusion in an immunity statute. Research reveals that the word "responsive" is also used in the basic New York immunity statute to describe answers required under that provision:

> "A witness who gives evidence in a grand jury proceeding receives immunity unless:
>
> (a) . . .
>
> (b) such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not *responsive.*" N.Y. CRIM. PROC. LAW §190.40-2, (Emphasis supplied).

From the Court's use of the word "responsive" in *Hoffman, supra,* as well as its employment in the New York statute, it is plain that "responsive" is not an arcane word. Rather than being a word fraught with uncertainty its meaning is easily comprehended. It is:

> ". . . [the property of] Answering, constituting or comprising a complete answer. A 'responsive' allegation is one which directly answers the allegation it is intended to meet . . ." BLACK, LAW DICTIONARY 147 (4th ed. 1951).

"Responsive" has also been defined as: "'that (which) responds; answering, replying, (*Webster's New International Dictionary,* (2nd ed.) p. 2124)'." *Savings Finance Corp.* v. *Blair,* 280 S.W. 2d 675, 677 (Mo. Ct. App. 1955).

In drafting N.J.S.A. 52:9M-17, the Legislature sought to insure that only a reply which actually was intended to "answer" the inquiry would be immunized. The clear intent was to avoid sham answers and unsolicited admissions designed to confer "immunity baths" of the type proscribed by the New York immunity statute, cited above, just as surely as the provision was designed to avoid perjury or complete failures to answer. *United States* v. *Bryan, supra,* 339 U.S. at 338-339.

Employment of the word "responsive" implements this intention more clearly than if the word "answer" had appeared alone in the provision. From appellant's point of view, it might just as well be argued that the word "answer" is itself too vague a term to satisfy due process, for in fact a "responsive answer" means no more than a good faith answer, that is, a *bona fide* attempt to present to the best of the witness's ability that information sought by the inquiry. See *In re Zicarelli, supra,* 55 N.J. at 270-271.

Even if the threat of subsequent use to incriminate the witness did exist as a result of the "responsive" requirement, it is well established that this Court could simply take a prophylactic approach to the statute and determine the use of the word "responsive" to be redundant, thus eliminating the alleged vagueness. *Lynch* v. *Overholser,* 369 U.S. 705, 710-711 (1962).

Appellant's contention that the grant of immunity is somehow defective in that it is conditional is without substance. The only "condition" placed upon the grant of immunity is a cognate of the condition of truthfulness itself, by which the witness has sworn to abide. Clearly the use of the word "truthfully" does not result in a conditional immunity. *Ferrantello* v. *State, supra,* 256 S.W.2d at 595. Annot. 53 A.L.R. 2d 1030, 1052 (1956); Annot. 118 A.L.R. 602, 627 (1939). In the context of an immunity provision the word "responsive" is nothing more than a restatement of the oath's requirement that the witness tell the "whole truth, nothing but the truth." An evasive, incomplete, irrelevant or misleading answer does not tell the "whole truth" and is not offered in good faith to meet that purpose.

POINT III

The threat of foreign prosecution is not relevant to the privilege against self-incrimination nor can appellant demonstrate a genuine fear that his compelled testimony might be used to incriminate him in a foreign prosecution.

A) Appellant fails to demonstrate real and substantial fear of prosecution by either Venezuela or the Dominican Republic.

It is appellant's contention that in addition to the threat of prosecution in this country, he currently faces a "real and substantial fear of foreign prosecution" in three other countries. Cf. *Murphy* v. *Waterfront Commission, supra,* 378 U.S. at 67-68. These other countries are the Dominican Republic, Venezuela and Canada.

Apart from referring to an article which indicates that appellant "has holdings in Venezuela" (App's Br. p. 38) which in itself is innocuous, appellant offers nothing to substantiate his claim that he is threatened with prosecution in Venezuela. Moreover, appellant acknowledges that he could not be extradicted to Venezuela even if an actual prosecution in that country was imminent.

The allegations connecting appellant with former Dominican Republic President Trujillo, although they intimate that appellant may have engaged in foul play at the behest of Trujillo, go no further than to allege his complicity in violating the laws of the State of New York and the United States, the locus of the alleged acts. It is hard to fathom on what basis appellant would have this Court determine that there is a real possibility of him being prosecuted and punished by the Dominican Republic for his alleged involvement in acts which took

place fifteen or twenty years ago in New York, even if the victims of such alleged crimes were Dominican citizens.

Again, the fact that appellant admits there is no treaty under which he might be extradited to the Dominican Republic for such crimes would appear to dispose of his contention with regard to that country. On the basis of appellant's own recitals it is respectfully submitted that the prosecution of the appellant by the Dominican Republic:

> ". . . is not a real and probable danger with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct' ". *Brown* v. *Walker, supra,* 161 U.S. at 608.

B) There is no threat that Canada would use disclosures compelled from appellant in a subsequent prosecution in Canada.

Of the three countries mentioned appellant concedes that Canada is the only one to which he could be extradited. (App's Br. p. 43). Appellant contends that he could be prosecuted for alleged violations of the Canadian Food and Drug Regulations in which he had been implicated. For argument's sake it may be assumed that appellant faces a "real and appreciable danger of prosecution on these charges."

Given the foregoing premise, two principal questions are raised: (1) May appellant be compelled to testify under grant of immunity, if such immunity does not purport to protect him against the possible use of his com-

pelled testimony in a foreign prosecution? (2) Would a Canadian court permit such compelled testimony to be used against appellant in a subsequent Canadian prosecution?

The result in *Murphy* v. *Waterfront Commission, supra,* is clearly bottomed on the proposition that a state clearly can compel testimony though by itself it lacks the power, and cannot even purport to protect the witness through its own devices, against the use of his compelled testimony by the second soverign, *i.e.,* the federal government.

In re Parker, 411 F. 2d 1067 (10 Cir. 1969) *cert. granted,* judgment vacated as moot, *sub nom Parker* v. *United States,* 397 U.S. 96 (1970) deals with the application of this principle to the same state of facts which underlies the first question. In *Parker,* the appellant argued that although she had been "granted immunity from both federal and state prosecution and accordingly adequately protected against her danger of self-incrimination in all courts within the United States . . .", *id.* at 1069, she could properly refuse to testify on the grounds that "certain of the questions propounded to her, if answered, would furnish a link in the chain of evidence needed to prosecute her for an extraditable Canadian crime." *Ibid.* Appellant makes nearly the identical contention.

Before dealing directly with this issue the Tenth Circuit observed that Rule 6 (e) of the Federal Rules of Criminal Procedure would prevent disclosure of matters brought before the grand jury unless otherwise ordered by a federal court; thus, the likelihood of such testimony ever being made available to a Canadian prosecutor was by itself infinitesimal. *Id.* at 1069-1070. It should be noted that the Commission's proceeding in which appellant was called to testify was *in camera* and provisions similar

to Rule 6 (e) govern the conduct of its investigations. Under N.J.S.A. 52:9M-15 and 16, it is likewise highly improbable that any information elicited from appellant could reach Canadian authorities.

The court in *Parker* however, because of the nature of the District Court's decision, squarely met the question of the relevancy of possible foreign prosecution to the protection of the privilege. In affirming the District Court's holding "that the Fifth Amendment provides no shelter for appellant against incrimination in a foreign jurisdiction", *id.* at 1070, the court went on to dispose of the argument that *Murphy* v. *Waterfront Commission, supra,* pointed to any different result:

> "It is true that Mr. Justice Goldberg, writing for the majority in *Murphy, supra,* traced the history and importance of the privilege against self-incrimination and in so doing indicated approval of some early English cases where the privilege was thought applicable to a 'foreign jurisdiction' or 'country'. But the Justice's reference to such cases was simply by way of argumentative analogy to this nation's state-federal relationship and carries no further persuasion. The Fifth Amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states, but need not and should not be interpreted as applying to acts made criminal by the law of the foreign nation." *Ibid.*

Although the question was not reached in *Parker,* it is well established that the Canadian courts would bar a Canadian prosecutor from making any use of incriminating testimony obtained through compulsion in this country. As demonstrated below, appellant would have the

same protection from the use of his compelled disclosures by a Canadian prosecutor as he would have against the use of such evidence in a subsequent prosecution brought by another state or the federal government, by virtue of the rule of *Murphy* v. *Waterfront Commission, supra.*

Canada, along with the United States, inherited the privilege against self-incrimination from the English common law. Canada has always honored that privilege without deference to the "dual sovereignty" doctrine which limited its efficacy in this country before *Murphy.*

More than forty years prior to the *Murphy* decision, the Supreme Court of Canada in *Prosko* v. *Rex,* 62 S.C.R. 226 (Sup. Ct. Canada 1922), rejected the notion that the dual sovereignty doctrine had any relevance where both sovereigns adhered to the privilege against self-incrimination. Grant, *Federalism and Self-Incrimination: Common Law and British Empire Comparisons,* 5 U.C.L.A. L. Rev. 1, 10 (1958).

In *Prosko,* the Canadian Court articulated the principle that the use of compelled evidence is barred under a single standard. This principle appears to have remained unchallenged from that time. In that case, defendant, after having been involved in a murder in Quebec, escaped over the border to Detroit whereupon he was arrested by United States Immigration officials with the connivance of the Canadian authorities. Upon being told that the Immigration Board was considering his deportation to Canada, he revealed his complicity in the Canadian murder to the American officials in an effort to avoid deportation. He repeated the same story before the United States Immigration Board and was thereupon deported to Canada.

A trial for murder ensued in Canada during which American immigration officials appeared at the trial and

repeated the confessions Prosko had made to them and to the Immigration Board. Prosko was convicted of murder and appealed to the Supreme Court of Canada.

Chief Justice Davis for the court found that irrespective of the place where the statements were made, their admission before a Canadian court was to be governed by:

> ". . . [what] has long been established as a positive rule of English criminal law, that no statement of an accused is admissible in evidence against him unless it is shewn [sic] by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by the person in authority. The principle is as old as Lord Hale." *Id.*, 63 S.C.R. at 229-230. See also, re admissibility *Piche* v. *Regina*, 74 W.W.R. 674, 11 D.L.R. 3d 700 (Sup. Ct. Can. 1970); Grant, *Federalism and Self-Incrimination, supra* at 10-11.

In 1952, the Federal Parliament of Canada enacted the *Canada Evidence Act*, R.S.C. (1952), c. 307. Section 5 of this act in effect abrogates the common law privilege against self-incrimination and replaces it with a broad "use" immunity provision, to wit:

> §5 "(1). No witness shall be excused from answering any question upon the grounds that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance

> of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then, although the witness is by reason of this Act, or by reason of such provincial Act compelled to answer, the answer so given shall not be used or receivable in evidence against him thereafter, taking place other than prosecution for perjury in the giving of such evidence."

By its own terms, this provision protects the appellant from the use of his testimony in a Canadian prosecution where, as here, he objects to answering such question on the grounds that his answer may "tend" to incriminate him under Canadian Law, that is, furnish a "link in the chain" of evidence required to establish his guilt under the Canadian Food and Drug Regulations. Thus, it is apparent that vis a vis a Canadian Federal prosecution, appellant would enjoy the same protection he is afforded under *Murphy* v. *Waterfront Commission, supra,* with respect to a subsequnt federal prosecution following his compelled testimony in New Jersey.

Hence, even if the threat of a prosecution in a foreign country were within the scope of the protection afforded by the Fifth Amendment, it is clear that appellant does not face any real threat that evidence he is compelled to give before the State Commission of Investigation may be used against him in a foreign prosecution. Canada, the only foreign jurisdiction where such threat is even colorable would not permit the introduction of testimony obtained through compulsion in a Canadian federal prosecution.

POINT IV

The availability of a use immunity statute is of significance to the effective administration of criminal justice.

The statute at issue in this case controls the workings of an investigatory agency of the State of New Jersey. That agency plays an integral role in the team concept of law enforcement that has developed in New Jersey and elsewhere in direct response to the sophisticated methods that are now being regularly employed by criminal elements throughout the United States.

In order to meet this challenge, the State has developed a number of innovative weapons such as state-wide grand juries, full-time prosecutors, availability of electronic surveillance under controlled conditions, as well as witness immunity acts.

New Jersey is not alone in promulgating a statute that compels testimony in exchange for immunity from the use of that testimony or its fruits. The Congress included a similar provision in the Organized Crime Act of 1970, 18 *U.S.C.* §§6001-6003.

In his concurring opinion in *Murphy* v. *Waterfront Commission, supra,* Mr. Justice White points out:

> ". . . the States still bear the primary responsibility in this country for the administration of the criminal law; most crimes, particularly those for which immunity acts have been proved most useful and necessary, are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the con-

tinuing viability of the States in our federal system." *Id.* 378 at 96.

The experience that appellee has had with the appellant in the present case illustrates how difficult it is to get at the roots of organized crime and to uncover information that will be useful in carrying out the mandate of the States to enforce the criminal law.

In testimony before a Congressional subcommittee, Professor Robert Dickson, a consultant to the National Commission on Reform of Federal Criminal Law, pointed out that an immunity statute of the sort here presented may have only corollary utility in certain kinds of conventional criminal investigation (as for example where there is a potentially cooperative witness), but that its great value lies in overcoming the resistance of the witness who does not intend to cooperate at all, regardless of the inducement. *Hearings on H.R. 11157 and H.R. 12041 before Subcomm. No. 3 of the Comm. on the Judiciary House of Representatives, 91st Cong., 2d Sess.* Admittedly, not even an immunity statute will necessarily compel testimony, but it is surely helpful in many situations.

The experience in New Jersey under this statute and under a related statute which is applicable to grand jury and court proceedings (N.J.S. 2A:81-17.3) is still rather limited. However, the present case suggests that the use immunity statute is making its mark. The State, therefore, welcomes this opportunity to present the legal issues to this Court and to have a definitive ruling in this most important area.

In supporting the appellee in this case, the State of New Jersey, as *amicus curiae*, respectfully urges that the best reason for affirming the validity of a use im-

munity statute is that there is nothing suggested by the Fifth Amendment to compel any greater tender to a witness. It has been pointed out that *Counselman* and its progeny developed in a different era before the exclusionary rules and before many of the problems presented by modern day crime had even been imagined.

If a man is compelled to testify but guaranteed that that testimony and the fruits of that testimony can never be used against him, it strains the concept of reasonableness to understand why he must be provided, in addition to that guarantee, an absolute assurance that he will not be prosecuted. If the government is successful in obtaining evidence independently, it should be permitted to procede with that evidence. While its burden may be great the question of whether it has carried that burden is factual and can be left to the wisdom of the courts and the juries that will ultimately consider it. Parenthetically, it has been suggested by the appellee that under a transactional immunity statute, there may actually be greater problems of proof that befall a witness than under a use immunity statute.

In the case of *United States* v. *Blue,* 384 U.S. 251 (1966), Mr. Justice Harlan writing for this Court pointed out that if the government acquires evidence in violation of the Fifth Amendment, the remedy is to suppress that evidence and its fruits at trial, not to dismiss the indictment. He said:

> "So drastic a step [barring prosecution altogether] might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with a public interest in having the guilty brought to book." *Id.* 384 U.S. at 255.

The reasoning in the *Blue* case has great pertinence here. It is similarly urged that to refrain from any prosecution as the price for information of criminality would be an intolerable interference with the public interest in having the guilty brought to justice. It is urged therefore that this Court put an end to the challanges to the concept of "use plus fruits" immunity and free the states to continue forthwith with their efforts to combat criminality through resort to statutes embodying that concept.

CONCLUSION

For the reasons expressed herein it is respectfully urged that N.J.S.A. 52:9M-17 be declared constitutional under the Fifth and Fourteenth Amendments of the United States Constitution and that the judgment of the Court below be affirmed.

Respectfully submitted,

GEORGE F. KUGLER, JR.
Attorney General of the State of New Jersey
Attorney For the State of New Jersey,
Amicus Curiae.

BARRY H. EVENCHICK
Deputy Attorney General
Chief, Appellate Section
Division of Criminal Justice

MICHAEL R. PERLE
Deputy Attorney General
Division of Criminal Justice
Of Counsel and on the Brief.